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IN THE

Supreme Court of the United States

No. 672.

THOMAS A. JOSEPH,
Petitioner,

vs.

THE STATE OF OHIO,
Respondent.

BRIEF OPPOSED TO PETITION FOR WRIT OF CERTIORARI.

INTRODUCTORY STATEMENT.

The record shows that in the state courts the only time the petitioner indicated a question was involved under the Federal Constitution, was in the notice of appeal filed in the Supreme Court of Ohio (R., 3) stating "This appeal is

taken to this court on questions of law and is filed on the following grounds, to-wit: (1) In a case involving a constitutional question under the Constitution of the state of Ohio, and under the Constitution of the United States"; and in the excerpts from appellant's brief in the Supreme Court of Ohio (R., 5) wherein it is stated: "Appellant says there is a constitutional question involved in this case."

That appellant files this case as a matter of right and avers that his conviction on Count No. 9 of the indictment which was affirmed by the Court of Appeals violates his rights under Article I, Section 10, of the Ohio Constitution, and the Sixth Amendment of the Constitution of the United States. * * *"

At no other time throughout the proceedings in the state courts is any reference made to a question under the Constitution of the United States. The prohibitions contained in the Sixth Amendment of the Constitution of the United States do not apply to proceedings in state courts, but to the procedure in the federal courts alone. 14 Am. Jur., page 891, Sec. 179; Snyder v. Massachusetts, 291 U. S., 97; State v. Perkins, 204 P. (2d), 207 (Wash.), certiorari denied, Perkins v. Cranor, 338 U. S., 862.

In the case of New York v. Kleinert, 264 U. S., 646, 650, it was stated that it is well settled that this court is without jurisdiction to review the judgment of a state court by reason of a federal question which was not raised below or called to the attention of or decided by the state court.

In Montana, ex rel. Haire, v. Rice, Treas., 204 U. S., 291, where the claim for the first time appears in the petition for writ of error that the judgment of the state court impairs the obligation of a contract, held, it comes too late to

give jurisdiction over that question even though another federal question has been properly raised and brought here by the same writ of error.

In Thomas v. Iowa, 209 U. S., 258, 263, it is stated that a mere claim in the court below, that there has been a denial of due process of law, does not of itself raise a federal question with sufficient distinctness to give us jurisdiction to consider whether there has been a violation of the Fourteenth Amendment of the Constitution.

In Bridge, Proprietor, v. Hoboken, 1 Wall., 116, 143, it has been stated that:

> "The true and rational rule is that the court must be able to see clearly, from the whole record, that a certain provision of the Constitution * * * was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied."

Where it does not affirmatively appear from the record that the accused was prejudiced by the alleged error or was prevented from having a fair trial, the claimed error does not constitute ground for a new trial or for the reversal of a conviction under Sec. 13449-5 G. C. (R., 20). State v. Brayden, 56 O. A., 19. This section of the General Code has been held to be constitutional. State v. Huffman, 138 O. S., 28, and State v. Hobbs, 134 O. S., 56.

QUESTIONS PRESENTED.

(1) The trial judge accompanied the jury and officers designated by him to have charge of the jury, to the Southern Hotel and ate dinner with them after the case had been submitted for deliberation by the jury. Counsel for the petitioner in urging this question in his petition for a writ of certiorari (p. 4), for the first time undertakes to

place this question under the Fourteenth Amendment to the Constitution of the United States; and in his brief (p. 7) in support of the petition says:

> "The petition for writ of certiorari sets out in three separate instances denials by the highest court of Ohio, of privileges and immunities guaranteed petitioner by the Constitution of the United States."

This assignment of error was not included in the motion for a new trial and was not noted in the record until after the motion for a new trial was overruled and the petitioner had been sentenced. In support of that statement the respondent calls the attention of this court to the fact that the record on page 37 showing the entry overruling the motion for a new trial and sentencing the defendant to the Ohio Penitentiary, is an excerpt from the bill of exceptions page 1194; and that the record page 35 shows excerpts from the bill of exceptions pages 1199 and 1200, in which this question was stipulated for the first time. In other words, the first reference to the trial judge eating with the jury appears on page 1200 of the state record which is six pages after the motion for a new trial was overruled according to the state record; and it was not until the petitioner had been sentenced to the penitentiary that an attempt was made to show that such conduct of the trial judge was prejudicial to the rights of the petitioner.

Under the rule in Ohio, on motion for new trial, the petitioner had the full right to take affidavits or testimony of jurors, if he believed he was prejudiced by the trial judge eating dinner with the jury and the sworn officers in charge of the jury. In State v. Adams, 141 O. S., 423, it was held on motion for new trial, affidavits or testimony of jurors may be received to show that unlawful com-

munications were made by the court officer to the jury during their deliberations. To the same effect, Emmert v. State, 127 O. S., 235.

However, the verdict of the jury cannot be assailed by mere suspicion and surmise. Baker v. Hudspeth, Warden, 129 Fed. (2d), 779 (where jurors improperly communicated with female deputy sheriffs), certiorari denied, Baker v. Hunter (successor to Hudspeth), Warden, 317 U. S., 681. In People v. Kelly, 94 New York, 526, the court answered a written communication of the jury and the record did not disclose what the communication was. The court implied that the harmful nature of such communication must be shown, saying that the presumption is that there was no violation of duty on the part of the court. No officer, without proof, will be presumed to have violated his duty. Gonzales v. Ross, 120 U. S., 605. There is no principle of law better settled than that every act of a court of competent jurisdiction shall be presumed to have been rightly done till the contrary appears. Voorhees v. Jackson, 10 Pet., 449.

In the case of Wood County Commissioners v. Shinnew, et al., 10 O. C. C. (N. S.), 54, the court had some communication with the jury. The agreed statement of counsel is that the jury wanted further instruction and that he said he had given them all the instructions upon the law which he was able to give and that he had nothing more to say in addition to the charge delivered. It was held that such action by the judge cannot be successfully attacked in a reviewing court on the ground that it amounted to error or misconduct prejudicial to the rights of either party. This holding was affirmed by the Supreme Court without opinion in 80 O. S., 712.

In the case of Gandolfo v. State, 11 O. S., 114, the trial judge in a murder case sent to the jury on their request, in the absence of the prisoner, a copy of the statutes of the state, calling their attention to the three sections relating to homicide: held, that it was an exercise of discretion on the part of the judge which did not prejudice the prisoner, and furnished no ground for the reversal of the judgment. Judge Gholson in delivering the opinion of the Supreme Court places their decision on the ground that many matters must rest in the discretion of the trial court, and if the matter complained of infringes upon no rule of law and merely affects the mode or manner of arriving at a determination, and not the right or merits to be decided, it is generally considered a matter of practice within the discretion of the court, with which it would not be proper for a court of error to interfere. Also that it must appear that there has been an abuse of discretion resulting in injustice. A difference of opinion as to the proper course of proceeding would not be sufficient; the appellate court must be able to say that the course pursued was not only improper, but that it operated unjustly and injuriously to the parties.

In the case of Dishmaker v. Heck, 159 Wisc., 572, the jury after retiring, were unable to decipher a word in the special verdict, the foreman returned into open court and asked the meaning of the word, to which the trial judge replied "punitive, by way of punishment"; and it was held there was no prejudicial error. C. J. Winslow called attention to the strictness of the Wisconsin courts on communications between the court and jury but stated that it was a "little less than absurd to hold because the trial court correctly told a juryman what a given word in

the special verdict was and what it meant there should be a new trial of the case. Such a holding would seem to be almost an affront to good sense."

In the case of State v. Parker, 12 S. W. (2d), 428, 321 Mo., 553, it was held in a murder case that the court had not committed error in discussing with the jury in a hotel dining room, where conversation relative to additional instructions and giving jury "raking" could not be taken seriously by jurors as an attempt to coerce them. It was said by P. J. White of that court:

> "That conversation with the juror was plainly a little badinage and hurt no one."

In the case of Ayrhart v. Wilhelmy, 135 Iowa, 290, it was held that neither misconduct of court nor jury can be predicated on the fact that during the deliberations of a jury the judge was called to the jury room and questioned by a member of the panel, when the nature of the interrogatories is not disclosed and it appears they were unanswered.

In the case of Phillips v. Commonwealth, 19 Gratt., 485, 60 Va., 485, it was held that:

> "The authority of a judge who presides at a criminal trial extends over the jury not only during the day whilst they are in court, but after the adjournment for the day; and it is not illegal or improper for the judge to take charge of a juror in the temporary absence of the sheriffs to whom the jury has been committed."

Judge Rives, in delivering the opinion of the court, says:

> "If it were possible to hold a continuous session, there would be no necessity of confiding the jury to anyone but the judge. He is the high and responsible functionary entrusted with the conduct of criminal trials, and bound to preserve the purity of jury trial

and place it beyond suspicion of all improper interference. It would be well for the protection of prisoners and the behaviour of juries if it were possible for the judge to keep them. Instead of its being said, he is the last man who should have charge of a jury, he is the first and best, and the very one to whom the charge is confided by law * * * But it is not possible for him to discharge the functions at all times; hence, has grown up the custom of committing the jury on the adjournment of the court for the day, to the sheriff sworn to 'keep' them, and neither speak to them nor suffer any other person to speak to them touching any matter relative to the trial until they return into court. * * *. From this theory of his office in jury trials, it can scarcely be that his oversight and superintendence are suspended by the adjournment of the court. He has many legitimate modes while in session, through instructions and charges to influence their finding, but no semblance of authority to approach them corruptly; so in his recess, he can have his eye upon them and exert a superintendence over them and their custodians so as to maintain the purity of the trial and the sanctity of their deliberations. Far distant be the evil day, when corruption shall have so soiled the bench and tainted the streams of justice as that the accidental or necessary presence of the judge with a juror shall not be received as a fair presumption that no wrong was done or permitted, but on the contrary, shall be accepted as proof of tampering. When that state of opinion shall prevail, all respect for the courts, all confidence in the administration of justice, all reverence for authority will have forsaken that department of the public service, usually deemed the last and best bulwark of public virtue and morals."

In Dodge v. United States, 258 Fed., 300, it was held the trial court's improper action in privately advising the jury that they might convict under a certain count is not re-

versible error, where no information was given which was not contained in the original charge. The court said it is evident that no possible harm resulted or could result therefrom. A writ of certiorari was denied in Dodge v. United States, 250 U. S., 660.

In the case of Snyder v. Massachusetts, 291 U. S., 97, this court held the state may regulate procedure of its courts in accordance with its own conception of policy and fairness unless it offends some principle of justice ranked as fundamental; that trial by jury may be abolished consistently with the Fourteenth Amendment; and that this amendment does not assume defendant the privilege to be present at a bare inspection by the jury, as the view by the jury is not a "trial" nor any part of a trial in the sense in which a trial was understood at common law. To same effect see Perkins v. Cranor, Supt., 338 U. S., 862, where certiorari was denied. In the case of Snyder v. Massachusetts, supra, this court further held that the constitutional rights of the defendant charged with murder are not impaired by the judge telling the jury that the view, from which the defendant excluded, was a part of the evidence; and that the presence of the defendant is a condition of due process under the Fourteenth Amendment to the extent that a fair and just hearing would be thwarted by his absence and to that extent only.

In the case of Gaines v. Washington, 277 U. S., 81, the petitioner had been sentenced to death for murder, he objected that he did not have a public trial; and it was held by this court that the Sixth Amendment (on public trial) does not apply to a state criminal prosecution; and that the exclusion of the public as against due process, is not presented by a record showing only an oral announcement

of the trial judge that the public would be excluded which was not carried out; and it was further held by this court that in criminal cases brought from the state courts on frivolous objections, the mandate will be ordered issued forthwith on denial of certiorari.

In Ray v. U. S., 114 Fed. (2d), 507, after the defendant had been found guilty, the jury inquired if a leniency recommendation were proper and the judge sent word by the deputy marshal that it would not be improper, the defendant was not present, this court held, if there was any evidence of a substantial nature that the communication influenced the jury or in any respect was prejudicial to the appellant, there should be a reversal, but that the record in this case convinces us that the incident was harmless. Certiorari was denied in Ray v. U. S., 311 U. S., 709.

In Fay v. N. Y., 332 U. S., 261, a statute was involved which authorized the selection of special or so-called "Blue Ribbon Juries" in certain cases, and this court held, these are local matters with which the local authority must and does have considerable latitude to cope, for they affect the administration of justice which is a local responsibility; such statute does not violate the due process clause of the Fourteenth Amendment; that the commandments of the Sixth and Seventh amendments, which require jury trial in criminal cases, are not made applicable to the states by the due process clause of the Fourteenth Amendment; and that the function of this court under the Fourteenth Amendment with reference to state juries is not to prescribe procedures but is essentially to protect the integrity of the trial process by whatever method the states see fit to employ; and beyond requiring conformity to standards of fundamental fairness that has won legal recognition,

this court adheres to a policy of self restraint in interpreting the Fourteenth Amendment and will not use that amendment to impose uniform procedure upon the several states whose legal systems stem from divers sources of law and reflect different historical influences.

In Dreyer v. Illinois, 187 U. S., 71, in a criminal case the jury retired to consider its verdict but the bailiff in charge was not sworn as required by statute, and objection was first raised on the motion for a new trial, it was held by this court, that the objection was not in time, and presented no question of a federal nature, but was an adjudication simply of a question of criminal and local law, and did not impair the constitutional guarantee that no state shall deprive any person of liberty without due process of law.

(2) The second question presented by the petitioner, is the claim that he was denied his right to be confronted by witnesses against him, because the divorce decree in the case of Wehr v. Wehr was admitted in evidence. Said decree recited in substance that on the evidence the court found the plaintiff at the time of filing her petition "was a bona fide resident of Franklin county" and the petitioner was being tried in a criminal case on a charge of subornation of perjury in the Wehr divorce case. Thus for the first time counsel for the petitioner undertakes to be more specific than just referring to the Sixth Amendment to the Constitution of the United States. "The provision of the Federal Constitution (Sixth Amendment on the right to confront witnesses) does not apply to proceedings in the state courts, but to the procedure in the federal courts alone. Nor does due process of law as guaranteed under the Fourteenth Amendment to the Federal Constitution

require that the right to confront witnesses, which is expressed in the Sixth Amendment be accorded to defendant in a state court." 14 Am. Jur., page 891, Sec. 179.

Exhibit K-2, which is in question is shown on page 39 of the record and discloses that the petitioner, Thomas A. Joseph, was attorney for the plaintiff, Pearl Wehr, in that divorce case. It must therefore not be overlooked that this divorce decree was the handy work of the defendant himself. He not only prepared it but secured the approval of the court and filed it as a part of the record in that case. The usual objection raised is that the defendant on trial for perjury was not a party to the proceeding in which the divorce decree was entered. Certainly, this reason has no application to the instant case where petitioner himself prepared the entry that he now complains of as being prejudicial to him when it was admitted in evidence. In any event such divorce decrees are admissible not to establish the falsity of the testimony, but as showing the giving of the testimony and its materiality. People v. Bradbury, 155 Cal., 808 and People v. Reitz, 261 Pac., 526.

In the case of Barrington v. Missouri, 205 U. S., 483, the state offered in evidence the statement made by the defendant following his arrest, over objection by the defendant, and in a rehearing before the Supreme Court of Missouri, defendant asserted the admission of such evidence violated Amendment V of the Constitution of the United States, as it compelled the defendant to become a witness against himself, and this court held, in a criminal case, rulings of the state courts in regard to admission of evidence afford no basis for holding the defendant was not awarded due process of law; and that Article V of the amendment to the Constitution does not operate as a re-

striction on the powers of the state but solely upon federal government. See to same effect, Malinski v. N. Y., 324 U. S., 401.

Counsel for the petitioner cite the case of Waldron v. Waldron, 156 U. S., 361; but that case is not controlling in the instant case, as the Waldron case originated in a Circuit Court of the United States and the United States Supreme Court has much more control over proceedings from a federal court than it does over criminal cases in the state courts, Malinski v. New York, 324 U. S., 401. In McNabb v. United States, 318 U. S., 332, it was held that the United States Supreme Court in the exercise of its authority over the administration of justice in the federal courts has formulated applicable rules of evidence; but it is recognized that the power of this court to undo convictions in state courts is limited to the enforcement of those "fundamental principles of liberty and justice," Herbert v. Louisiana, 272 U. S., 312, 316 and Malinski v. New York, 324 U. S., 401.

(3) The third question presented by the petitioner is that he was prejudicial and prevented from having a fair trial since his counsel asked for two hours for argument and the court only granted them one hour and a half.

The record discloses that this alleged error was presented to the trial court after the motion for a new trial had been overruled and the petitioner sentenced to the Ohio Penitentiary, and consequently was not one of the assignments of error set up in the motion for a new trial. This is borne out by the fact that the record discloses on page 37 that the entry overruling the motion for a new trial and sentencing the petitioner is an excerpt from the bill of exceptions, page 1194, while page 35 of the record

discloses that the stipulation as to the time limitation for argument appeared on page 1199 of the bill of exceptions. In other words, the alleged error involving limitation of argument is set up on page 1199 of the bill of exceptions in the state court while the entry overruling the motion for a new trial and the sentence of the court appears on page 1194 or six pages before the alleged error was inserted in the record.

The record further discloses that no objection was taken at the time the limitation on argument was made by the court, and the record fails to disclose that at any later time counsel for the petitioner requested further time from the court if they felt that more time had been found necessary. The alleged error on limitation of argument having not been made a part of the motion for a new trial, plainly discloses that this was merely an afterthought following the sentence of the petitioner to the Ohio Penitentiary.

Counsel may not apparently agree or acquiesce by failure to object, in the allotment of time for argument and afterward complain that the time was too short, Capinola v. United States, 61 Fed. (2d), 5, certiorari denied in Walsh v. United States, 287 U. S., 671.

Accused is entitled to only a reasonable time for the argument of his cause—not a reasonable time for every attorney he might wish to defend him, Cox v. Commonwealth, 215 Ky., 585.

In the case of Weaver v. State, 24 O. S., 584, Judge White says:

> "Full time should be allowed for the fair discussion and presentation of the case. What might be reasonable in one case would be unreasonable in another. In the present case the action of the court below shows no just ground for our interference."

It is objected in the instant case that there were numerous exhibits to be considered, but it can readily be seen by Exhibit K-2 (R., 39) that these exhibits would all be pretty much of the same pattern, such as the divorce case file, the petition and the decree, both of the latter having been prepared by the defendant himself; and this case involved the testimony of the various divorce clients of the petitioner, and centered around testimony as to their pretended residence in Franklin county. In the case of Decker v. State, 113 O. S., page 512, 523, Judge Allen states:

> "These authorities lay down the rule that in the absence of statute the trial court in its sound discretion may properly limit the time consumed by counsel in argument, and that this discretion will not be interfered with by the appellate court, unless the time of argument in trial was made so short as manifestly to deprive counsel from presenting the case fully and fairly."

In the case of United States v. Kay, 101 Fed., 270, involving twenty-five counts in an indictment, error was assigned on restricting counsel's time in summation, and it was held, this is always a matter to be disposed of by the exercise of a sound discretion in the course of a trial. Certiorari was denied in Kay v. United States, 306 U. S., 660.

In Wagenman v. United States, 269 Fed., 568, the trial court limited argument to the jury to fifteen minutes on each side, and when defense counsel complained this time was insufficient, the court observed: "You have been too long putting it (the case) in." Held: While it may well be that a somewhat longer allowance would have been better, the court was not convinced that the defendant was prejudiced by this limitation. There is much to be said in favor of the court's action. We are unable to say that the

court abused its discretion. Certiorari was denied in Wagenman v. United States, 255 U. S., 572.

In Brooks v. State, 187 Tenn., 67, the trial court allowed fifteen minutes on each side for argument, held by the Supreme Court of Tennessee that it could not say record shows abuse of discretion by trial court. Certiorari denied in Brooks v. Tenn., 71 United States Supreme Court, 21.

In Cases v. United States, 131 Fed. (2d), 916, involving a trial in Puerto Rico on violating the Federal Firearms Act, and twenty minutes for oral argument was allowed, held, not an abuse of discretion by the trial court. Certiorari denied in Velazques v. United States, 319 U. S., 770.

CONCLUSION.

Counsel for the respondent respectfully submits to the court that this being a criminal case brought from the Supreme Court of Ohio, on objections that are without substantial merit, certiorari should be denied and the mandate ordered issued forthwith.

Respectfully submitted,

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